

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

I. Date of Initial Statement of Reasons: August 12, 2004

II. Dates and Locations of Scheduled Hearings:

- (a) Notice Hearing: Date: October 21, 2004
Location: Concord, California
- (b) Adoption Hearing: Date: February, 2005
Location: To be determined

III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.2 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.

Scotts Valley polygonum (*Polygonum hickmanii*) is a small annual plant in the Buckwheat Family (Polygonaceae). The worldwide distribution of Scotts Valley polygonum comprises two populations in Scotts Valley, Santa Cruz County, California, which are less than one mile apart and occupy a combined total area of less than one acre. Since the species was discovered in 1990, the total number of plants in the populations has ranged annually from 200-400 plants to 3500 plants. Both populations of Scotts Valley polygonum occur on private lands without legally binding conservation agreements; there is no guaranteed long-term protection of the species. The populations are threatened by habitat loss and degradation and other human-related activities. Competition with non-native plants may also adversely affect the viability of the populations. Scotts Valley polygonum is at high risk of extinction due to the small number of plants at each occurrence and the limited extent of available habitat. The protection of the California Endangered Species Act (CESA)

is necessary to prevent the further decline and potential extinction of this species of plant.

At its June 19, 2003, meeting, the Commission designated this plant a candidate for listing and a Notice was prepared and filed with the Office of Administrative Law. During the one-year candidacy period the Department of Fish and Game (Department) evaluated this species relative to the proposed listing as endangered. Based on the level and degree of present and potential threats to this species, the Department finds that the petitioned action is warranted and recommends that Scotts Valley polygonum be listed as endangered.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7 and 2075.5, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list Scotts Valley polygonum as endangered (Dr. Grey Hayes, January 6, 2003). Report to the Fish and Game Commission on the status of Scotts Valley polygonum.

- (e) Public Discussions of Proposed Regulations Prior to Notice publication:

The Commission will hear public testimony at their October 21, 2004, meeting, prior to the notice publication.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change:

List as Threatened:

Scotts Valley polygonum is known from only two populations worldwide, in Scotts Valley, Santa Cruz County, California. The total occupied area is less than one acre. The populations are threatened by habitat modification and destruction and other human-related activities, and may also be adversely affected by competition with non-native, invasive

species. The species is highly vulnerable to chance events due to the small number of plants and small area of occupied habitat. Because of the small population sizes and the level and degree of threat to the species, the Department finds that the species is in imminent danger of extinction. This high level of threat meets the criteria for endangered rather than threatened status. The Department, therefore, finds that listing as threatened would not be the appropriate designation.

(b) No Change Alternative:

Attempting to bring about the protection and recovery through land management or regulatory actions of other state agencies would be inadequate. The species currently occurs entirely on private land without the benefit of any legally binding conservation easements, and is therefore guaranteed no long-term protection. Other agencies generally do not have the authorities to adequately protect or manage habitats for non-game species, nor do they usually commit the necessary funds and manpower to such efforts unless the species are officially listed as threatened or endangered. Even if such commitments or actions are forthcoming, the policy of the Legislature is that they are no substitute for the recognition and protection intended by CESA.

Failure to officially recognize Scotts Valley polygonum as threatened or endangered will deprive this plant of adequate consideration under CESA and the California Environmental Quality Act (CEQA). Without such recognition, Scotts Valley polygonum is at increased risk for decline and extinction. The Department is fulfilling its statutory obligation in making this proposal (Sections 2055, 2073.5 and 2074.6, Fish and Game Code).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because the species is restricted to an area of less than one acre in central coastal California.

While the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of Scotts Valley polygonum as endangered will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or in the California Desert Native Plants Act.

Endangered status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Based on its rarity, Scotts Valley polygonum would qualify for this protection under CEQA.

Required mitigation as a result of lead agency actions under CEQA, whether or not a taxon is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. If the mitigation measures required by CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

(c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Designation of threatened or endangered status, *per se*, would not necessarily result in any significant cost to private persons or businesses undertaking activities subject to CEQA. CEQA presently requires applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380). Based on its rarity, Scotts Valley polygonum would qualify for this protection under CEQA.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

(e) Nondiscretionary Costs/Savings to Local Agencies:

None.

(f) Programs mandated on Local Agencies or School Districts:

None.

(g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

(h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game proposes to amend Section 670.2 of Title 14, CCR, to add Scotts Valley polygonum to the list of endangered plants. This proposal is based upon the documentation of threats to the habitat of this species to the point that it meets the criteria for listing as endangered by the Fish and Game Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. Scotts Valley polygonum is extremely rare; its worldwide distribution is limited to two populations in California occupying a total area of less than one acre.

